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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-203

SATIRIS G. FASSOULIS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated New York, N. Y., August 9, 1971

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Supreme Court of the United States

No.

SATIRIS G. FASSOULIS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Satiris G. Fassoulis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 18, 1971.

Opinion Below

The opinion of the Court of Appeals, as yet unreported, is set out in Appendix A, *infra.*

Jurisdiction

The judgment of the Second Circuit Court of Appeals, Appendix B, *infra,* was entered on June 18, 1971. Peti-

tioner's petition for rehearing Appendix C, *infra,* was timely filed on July 1, 1971, and denied by orders dated July 15, 1971, Appendices D and E, *infra.*

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Rule 22(2).

Questions Presented

1. Was petitioner deprived of his Sixth Amendment right to trial in the "District wherein the crime shall have been committed" by the complete failure of proof that any of the four mail fraud count letters passed from, through or into the United States mails in the Southern District of New York?

2. Was petitioner deprived of his Fifth Amendment right to due process by the complete failure of proof that any of the four mail fraud count letters passed through the United States mail?

3. Was petitioner deprived of his Fifth Amendment right to due process by the Circuit Court's adoption of a "credible inference" rule respecting proof of mailing, in place of the "proof beyond a reasonable doubt" required by *In re Winship* (1970), 397 U. S. 358, 366?

4. Did the judgment of conviction on the conspiracy count deprive petitioner of his Fifth Amendment protection against double jeopardy, in its collateral estoppel dimensions, as established by *Ashe* v. *Swenson* (1970), 397 U. S. 436?

Constitutional and Statutory Provisions and Rules and Regulations Involved

Question 1 involves the Sixth Amendment of the United States Constitution, 19 U.S.C. §3237(a), and Rule 18 of

the Federal Rules of Criminal Procedure. These are set forth in Appendix F at pp. 29a, 31a and 32a, respectively.

Question 2 involves the Fifth Amendment of the United States Constitution and Postal Procedures TL-226, §333.-344b(c). These are set forth in Appendix F at pp. 29a and 32a, respectively.

Questions 3 and 4 involve the Fifth Amendment of the United States Constitution, which is set forth in Appendix F at p. 29a.

Statement of the Case

Petitioner was convicted by a jury, in the Southern District of New York, of four substantive counts of mail fraud (18 U.S.C. §1341), and one count of conspiracy to commit mail fraud (18 U.S.C. §371).

Originally, the indictment contained seventeen counts, the one conspiracy count and sixteen mail fraud counts. Four of the mail fraud counts were dismissed on the government's motion at the close of its case.

The jury convicted on the remaining thirteen counts. Thereupon, on petitioner's motion, the trial court set aside the jury's verdict and dismissed eight of the twelve mail fraud counts for failure of proof of mailing of the count letters.

On the five remaining counts, petitioner was sentenced to five concurrent terms of four and one-half years' imprisonment. Petitioner's bail upon arraignment was fixed at $10,000, was furnished by a Surety Company bond in that amount, and has continued at that figure through the appeal. The Circuit Court refused to continue bail pending application for certiorari and an application for continuance of bail has been denied by Mr. Justice Harlan.

Each of the following four questions is based on a constitutional right. So far as relevant, the facts are stated under the respective points. No issues of fact and no disputed facts are involved.

(a)

On Question 1

As summarized in the Circuit Court opinion, Appendix A, *infra*, p. 8a, all the proof of mailing, if proof it be, was this:

> "The testimony of AIC's secretary that she typed the letters in New York, Dean's receipt of them in Philadelphia, the scheme for applying for loans all over the country, all lead to the credible inference that the letters involved here went through the mails."

We shall discuss under questions 2 and 3, *infra*, this "credible inference" of mailing. We are here concerned that the Circuit Court casually disposed of the Sixth Amendment requirement of venue in a footnote (Appendix A, *infra*, p. 8a), as follows:

> "8. The evidence was sufficient to indicate that the letters were mailed in the Southern District of New York. That is all the venue statute, 18 U.S.C. §3237(a), requires. *United States* v. *Cashin*, 281 F. 2d 669 (2 Cir. 1960)."

There was, concededly, no physical evidence of such mailing in the Southern District of New York. Equally there was no testimonial evidence to that effect. All the proof showed was that the secretary, referred to in the first above excerpt, *typed* the subject letters in the com-

pany's office in the Borough of Manhattan, in the Southern District of New York, and the letters ultimately reached the witness, Dean, in Philadelphia. But there is no dispute regarding the fact that she, herself, did not mail any of the four letters; that she was not asked, and did not say, what she did with the letters after typing; that she did not see them signed by anyone; and that she did not know who signed them. Since they are signed with the name Leonard Case, it is clear that, after typing them, she handed them over to some other unidentified person. She was not asked, and presumably knew nothing, about the method of their delivery.* In a multi-district locality like New York, the letters (assuming they were mailed at all) could be mailed quite conveniently in other districts close-by, such as the adjacent Boroughs of Brooklyn and Queens in the Eastern District of New York, or nearby Jersey City, Newark, Weehawken, etc., in the District of New Jersey. The government was under the positive burden of showing that the letters passed through the United States' mail in the Southern District of New York and wholly failed to do so.

Thus, it remains a mystery how or where the Circuit Court could find any indication, much less any *proof beyond a reasonable doubt,* that any of the four letters passed through the United States' mail *in the Southern District of New York.* There simply was no evidence to that effect.

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* Other methods than mailing were and are readily available, namely, Air express by company such as Air Express, Division of REA, Express, 219 East 42nd Street, New York City and 61 South Clinton Street, Chicago, or bus delivery by companies such as Continental Trailways, Package Express Department, 8th Ave., and 41st Street, New York City and 1200 Eye St., Wash. D.C. 20005; and of course, messenger and personal hand delivery.

Venue in a criminal case is not a formality, but a "deep issue of public policy" *Travis* v. *U. S.* (1961), 364 U. S. 631, 632; *U. S.* v. *Johnson* (1944), 323 U. S. 273, 276. In a recent illustrative case, where postal money orders were purchased in Baltimore, Maryland, and cashed in Washington, D.C., in an altered condition, a conviction in the District of Columbia for altering the instruments was reversed for failure of proof that the altering was done in the District. The Court held that "proof of venue in the District of Columbia was *essential* to the District Court's jurisdiction over the charges of altering . . ." *Serio* v. *U. S.* (C. A. D. C., 1967), 377 F. 2d 936, 940, emphasis added. In a mail fraud charge, the mailing is the "sine qua non of the crime" *U. S.* v. *Baker* (C. A. 2, 1931), 50 F. 2d 122, at 122. Trial may be had only in the "place of mailing, place of receipt of mail or place through which mailed matters passed" *U. S.* v. *Cashin* (C. A. 2, 1960), 281 F. 2d 669; 18 U.S.C. §3237(a).

We note that the Circuit Court footnote states that the evidence was sufficient to "indicate" mailing in the Southern District of New York. Thereby, the Court seems to set up a lesser measure of proof of this essential fact of venue than the required proof beyond a reasonable doubt. The resulting judgment of conviction offends both the venue requirement of the Sixth Amendment, and the rule of *In re Winship* (1970), 397 U. S. 358, 366:

> "Lest there remain any doubt about the constitutional structure of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

On Questions 2 and 3

But beyond the failure to prove mailing *in the district*, there was no testimonial or physical evidence, beyond a reasonable doubt, of mailing at all. The Circuit Court had, perforce, to resort to a "credible inference that the letters involved here went through the mails". Even to reach that "inference" the Court had to, and did, disregard the most relevant fact in the record, a fact that compels the inference of non-mailing. The Government produced only one envelope (part of Gov. Exh. 198), in the entire case. With respect to that envelope, the Court said (Appendix A, p. 7a):

> "No direct evidence was introduced at trial that they were mailed in New York but the Government Exhibit, the Count Eight letter, was marked 'Special Delivery', and the envelope front attached to the letter had a private postage meter mark showing New York as the place of mailing."

The words "Special Delivery" were written thereon by the secretary who did not mail the envelope or know anything about how it was sent or what happened to it. The private postage meter tape was put on in the AIC office but it is not a U. S. Postal Marking. It does not show "New York as the place of mailing." *It does not show "mailing" at all.* It is a meter charge in lieu of buying and affixing regular stamps, a method of giving postal credit, nothing more.*

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* The meter tape reads "New York, N. Y. June 18, '68, U. S. Postage 48 T.-N Meter Company." It is a commonly known fact that these postage tapes bear marks identifying the company which manufactures the particular machines, in this case Postalia Corp. 32-31 Woodside Queens, N. Y., which uses the mark T-N. See Postalia Corp., in the New York Telephone Manhattan Yellow Pages, 1970, page 1204.

The above quotation from the Circuit Court opinion refers to an envelope *front*. The Government Exhibit itself is not a whole envelope; the back half has been completely removed, partly cut and partly torn off. The inference from its mutilated state is compelling. Had this presumably "Special Delivery" envelope been posted in the United States' mail, the reverse side would have shown definitely the fact of mailing. See:

> "Postal Procedures TL-226 333.344b*
>
> 333.344b. Acceptance, Distribution & Dispatch:
>
> Distribution
>
> C. Special Delivery Letters. Backstamp once at the point where incoming pouches are first opened. If special delivery service is decentralized, backstamp both at original pouch opening point and delivery unit. The backstamps must show unit name, date and hour or half hour of receipt."

But the reverse side, the back half of the envelope is missing,—removed, we submit, because there were no U. S. post office backstamps on it and their absence would establish beyond peradventure of a doubt the "non-mailing."**

The Circuit Court erroneously accepted this envelope front as proof of mailing in New York, shut its eyes to the more-than-circumstantial proof of non-mailing, and adopted a "credible inference" standard of proof of mailing never before invoked in a mail fraud case.

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* On judicial notice of postal regulations, see *Coha* v. *United States* (1894), 152 U. S. 211, 221; *Hughes* v. *Genler* (C. A. 9, 1969), 404 F. 2d 229, 231.

** Mr. Shaw, the prosecutor, explained on the argument in the Circuit Court, dehors the record, that the witness Dean delivered the envelope to him already mutilated, and told him that he, Dean, had removed the back "to save space".

Even beyond the total absence of proof of mailing of any of the four Count letters, and of this one envelope front that was produced, there is no credible evidence in the entire record either from the company secretary or anyone else, that the mails were used in any single instance. The fact that the Trial Court was compelled, reluctantly, to dismiss the other eight substantive counts after a guilty verdict, is eloquent enough on the absence of proof of mailing.

Thus, the judgment of conviction rests upon an evident insufficiency of proof of mailing, the "sine qua non of the crime" *U. S.* v. *Baker, supra,* and deprives petitioner of his right to due process in a record that mocks the constitutional requirements of *In re Winship* (1970), 397 U. S. 358, 366.

On Question 4

Two of the overt acts in the conspiracy count were the "mailing" of the same four letters that were the count letters in four substantive mail fraud counts. The guilty verdict on these four counts was set aside and the four counts dismissed by the Trial Court for failure of proof of mailing. Petitioner submits that the Court's refusal at that point to grant his motion to set aside the conspiracy verdict deprived him of his Constitutional protection against double jeopardy in its collateral estoppel aspects, under *Ashe* v. *Swenson* (1970), 397 U. S. 436.

A similar fact situation appears in *Yawn* v. *U. S.* (C. A. 5, 1957), 244 F. 2d 235 (cited with approval in *Ashe* v. *Swenson, supra,* footnote 7).

In *Yawn* there were two indictments, one for conspiracy and a second for the substantive offense. The *Yawn* conspiracy indictment alleged, as one of ten overt acts,

the possession of an unregistered still, as an act in effectuating the conspiracy. On a trial of the substantive offense of possessing the unregistered still, the defendant was acquitted. On a subsequent trial of the conspiracy charge, the Trial Court admitted evidence of Yawn's possession of the still and put to the jury the issue whether he possessed the still as an overt act to effect the conspiracy.

The Circuit Court reversed the guilty verdict. Commenting on its *Yawn* decision, in its later case, *Parr* v. *United States* (5 C. A. 1959), 265 F. 2d 894, at p. 899, the Court said:

> "Although [in *Yawn*] there were other overt acts alleged, the jury's finding of guilty on the conspiracy charge could have been based on a finding that he possessed the still, a fact which the jury had previously acquitted him on. We therefore reversed for a new trial."

Yawn is squarely in point, with the immaterial difference that here, instead of separate trials of the conspiracy and substantive charges, there was a single trial on one indictment containing both charges, each of which however, may be regarded as a separate indictment. *Dunn v. United States* (1932), 284 U. S. 390.

The error at bar was all the greater, because the Trial Court had charged, repeated, and re-repeated, a specific instruction, correct in law, but fatally prejudicial in the circumstances, that proof of the commission by any co-conspirator of any single overt act of the ten charged, was sufficient to support a conviction of petitioner for conspiracy.

A fact situation similar to that in *Yawn* but in reverse order, arose in *Sealfon* v. *United States* (1948), 332 U. S.

575. There the conspiracy indictment was tried first and the defendant acquitted. Then followed the trial of the substantive charge of uttering the same false invoices that had been introduced at the conspiracy trial as part of the conspiracy. This Court reversed the judgment of conviction, holding that by the doctrine of collateral estoppel, the conspiracy not guilty verdict "precludes a later conviction of the substantive offense."

The doctrine of collateral estoppel in *Sealfon* has since been raised to constitutional status as part of the Fifth Amendment guaranty against double jeopardy. *Ashe* v. *Swenson* (1970), 397 U. S. 436. That exalted status would not even be necessary to determination here, since our issue, like that in *Yawn*, arose in a Federal trial, and the Court's supervisory power over the Federal Court system suffices. See *Ashe* v. *Swenson, supra.*

The dismissal here of the substantive counts for failure to prove a prima facie case, is as effective as if there had been a finding of innocence thereon, for "* * * one judgment that he (defendant) is free as matter of substantive law is as good as another." *United States* v. *Oppenheimer* (1916), 242 U. S. 85, 87.

The Circuit Court has attempted to distinguish *Yawn* by a distinction that involves no difference. Acknowledging the double jeopardy constitutional dimensions of collateral estopped (*Ashe* v. *Swenson* (1970), 397 U. S. 436), the Court nonetheless says (Appendix A, p. 11a):

> "In any event *Yawn* is not applicable to the present case inasmuch as collateral estoppel could not have arisen until after the verdict."

But the late timing of the estoppel was not petitioner's fault. Had the Trial Court dismissed the four substantive mailing counts, involved in overt acts seven and

nine, when it should have, that is, at the close of the government's case, the collateral estoppel would then have arisen before the verdict, and the principle of *Yawn* would apply in full vigor. Is petitioner to suffer the loss of his Constitutional right because the Trial Court made an error which it subsequently had to correct?

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Petitioner.

JAMES J. DOYLE
WILLIAM T. GRIFFIN
Of Counsel

Dated: New York, N. Y., August 9, 1971

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 450—September Term, 1970.

(Argued February 11, 1971 Decided June 18, 1971.)

Docket No. 35479

UNITED STATES OF AMERICA,

Appellee,

—v.—

SATIRIS G. FASSOULIS,

Appellant.

Before:

FRIENDLY, *Chief Judge,*

WATERMAN, *Circuit Judge* and MCLEAN, *District Judge.**

Appellant, convicted after a jury trial, United States District Court for the Southern District of New York, Tyler, *J.*, of having violated 18 U. S. C. §1341 in that he used the mails to defraud, and 18 U. S. C. §371 is that he conspired so to do, appeals his conviction.

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* Of the Southern District of New York, sitting by designation.

Appendix A

Conviction affirmed.

EDWARD M. SHAW, HOWARD WILSON, Asst. United States Attorneys, WHITNEY NORTH SEYMOUR, JR., United States Attorney, *for Appellee.*

WILLIAM T. GRIFFIN, PETER D. GRIFFIN, JAMES J. DOYLE, New York City, *for Appellant.*

WATERMAN, *Circuit Judge*:

Satiris G. Fassoulis, three other individuals, and three corporations were charged in a seventeen count indictment filed on September 3, 1969, with one count charging, in violation of 18 U. S. C. §371, conspiracy to use, and with sixteen counts alleging specific substantive acts of using the mails in furtherance of a scheme to defraud in violation of 18 U. S. C. §§1341 and 2.[1] Prior to trial co-

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[1] §1341 provides:

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appendix A

defendants Rafsky, Reifler, Ryan, AIC Corporation and Intercoastal Investors Company, Ltd. entered guilty pleas to one or more counts; charges as to codefendant Community National Life Insurance Company were severed. Fassoulis was tried alone before Judge Tyler and a jury. He did not take the stand and offered no evidence in his own behalf.

From evidence presented by the Government the jury could reasonably have found that during April and May, 1968, appellant, founder of AIC Corporation (hereinafter "AIC"), accompanied by codefendants Rafsky and Reifler, officers of AIC and co-founders of Intercoastal Insurance policies reciting that they were fully paid for were issued to AIC on the lives of appellants, Rafsky vestors Company, Ltd. (hereinafter "Intercoastal"),[2] traveled to Tulsa, Oklahoma from their New York offices where they met with codefendant Ryan, President of codefendant Community National Life Insurance Company (hereinafter "Community National") in order to have their companies, AIC and Intercoastal, purchase insurance policies on their lives. A series of transactions were consummated. No cash was paid to Community National and no premium on any policy was paid to or accepted by Community National, but in return for the delivery of 750,000 shares of common stock in Tintair, Inc., recently acquired by AIC,[3] sixty-four single premium insurance policies reciting that they were fully paid for were issued to AIC on the lives of appellants, Rafsky

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[2] Intercoastal was founded by Rafsky and Reifler in January, 1968. It shared office space with AIC.

[3] AIC acquired Tintair at an agreed price of one dollar per share by an agreement entered into in April, 1968. In all, AIC acquired one million shares of Tintair. Payment for the stock, however, was never tendered.

and Reiffler. Crucial to the implementation of the scheme the three men planned to put into operation were the policies' stated cash surrender values which approximated $2.6 million. Although it was clearly understood that the stated surrender rights in the policies could not be utilized in any way unless and until premiums had been fully paid, Ryan nevertheless assured Fassoulis that this agreed upon and understood limitation on the cash surrender rights would not be disclosed to anyone, even if some of the policies were assigned as collateral by AIC for bank loans, unless a lender specifically asked about the cash values. The likelihood of such a request was minimal for no notation was made on the face of the policies to modify the printed language contained therein stating that AIC, as owner, had the right to surrender the policies and obtain a substantial cash payment from Community National within six months.[4] Armed with these unaltered policies which they offered as collateral, Fassoulis, Rafsky and Reifler approached seventeen banks for loans on behalf of AIC; and they successfully obtained from eight of the banks loans in excess of $669,000 before this and other frauds were discovered.

The Government's evidence, insofar as it is relevant to this appeal, established that Fassoulis, Rafsky and Reifler borrowed money from the Cleveland Trust Company and the Long Island Trust Company without informing

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[4] "The Owner of this Policy may surrender it at any time for its cash value less any indebtedness to the Company hereon. The cash value of this Policy on its Date of Issue after the premium herefor has been paid shall be $644.74 per $1000 of Face Amount." The provision then calculates the cash surrender value into the future; for example, after twenty years the surrender value is $1056.73 per $1000.

the lending officers that AIC had no immediate right to the cash surrender value. Further, in responding to questionnaires from Bankers Trust Company (New York), the Bank of the Commonwealth (Detroit), and the Cleveland Trust Company, Ryan concealed the restriction upon the negotiability of AIC's cash surrender rights.

From AIC's inception,[5] Fassoulis represented that one of AIC's vice presidents was a "Leonard Case," a former associate of J. H. Whitney and a Director of United Artists Corporation. Fassoulis, Rafsky and Reifler signed "Case's" name to AIC documents. In July 1968, Fassoulis presented himself as "Case" to an officer of the Cleveland Trust Company, signed that name to a loan note, and sat by while Rafsky explained that Fassoulis was AIC's foreign contact. The Government's evidence also tended to prove that Fassoulis impersonated "Case" during negotiations with the First Pennsylvania Bank & Trust Company.

While applying for a loan from the Cleveland National Bank, Rafsky, in Fassoulis's presence, told a bank officer that the insurance policies had been acquired in connection with a West Coast real estate transaction, and the officer was also told that AIC had purchased a broom factory in Ecuador, and would be importing brooms into Cleveland via the St. Lawrence Seaway.[6] Both of these statements were false.

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[5] AIC was not incorporated until July 1, 1968. The prosecution charged that Fassoulis had passed off AIC as an existing corporation before that date in furtherance of his fraudulent scheme.

[6] AIC's Treasurer, a part-time employee (who was not indicted), testified that AIC's only connection with the broom business was that he ordered three sample brooms from Ecuador in June, 1968, and twelve more in the fall.

Appendix A

Finally, in connection with a loan application to the United California Bank, it was conceded at trial that AIC's balance sheet carried a fictitious double entry concerning the real estate transaction mentioned above.

Counts Three, Thirteen, Fourteen, and Seventeen, all with reference to the attempted swindle of the Chase Manhattan Bank and the First Pennsylvania Bank & Trust Company, were dismissed at the close of the Government's case. The jury returned guilty verdicts on the conspiracy count (Count One) and on the remaining twelve substantive counts. Subsequently Judge Tyler set aside the verdicts on eight of these twelve, Counts Two, Four, Six, Seven, Nine, Ten, Eleven and Fifteen, for lack of proof of use of the mails. Appellant was sentenced to concurrent terms of four and one-half years on Count One, and on each of the four remaining substantive counts, Counts Five, Eight, Twelve and Sixteen,[7] but is presently enlarged on bail pending determination of this appeal.

The Substantive Counts

Each of the substantive counts upon which a judgment of conviction has been entered is premised on a letter from AIC to Robert Dean, a loan officer of the First Pennsylvania Bank & Trust Company, signed by "Leonard Case." Use of the mails is the "gist or corpus" of the offense charged. *Mackett* v. *United States*, 90 F. 2d 462, 464 (7 Cir. 1937). Whether the Government's proof of use of the mails was sufficient to permit jury consid-

[7] Count One is the conspiracy count. Counts Five, Eight, Twelve, and Sixteen involve attempts to perpetrate the fraud by obtaining loans from the First Pennsylvania Bank & Trust Company.

eration of this basic issue is the preliminary question which we must first determine.

There is no doubt that the letters were typed in AIC's New York headquarters. Nor is it challenged that they were received in Philadelphia by Dean. No direct evidence was introduced at trial that they were mailed in New York, but the Government's Exhibit, the Count Eight letter, was marked "Special Delivery," and the envelope front attached to the letter had a private postage meter mark showing New York as the place of mailing. The letters underlying the remaining three substantive counts showed AIC's New York office as the mailer's address but no envelopes were introduced at trial to substantiate the assertion that they were mailed in New York. Dean testified that he received all four letters "as mailings," but the Government did not follow this up by introducing into evidence any testimony relative to the general practice of the bank, or of its customs, usages or practices with reference to incoming correspondence, see *Stevens* v. *United States*, 306 F. 2d 834, 835 (5 Cir. 1962).

Appellant has seized upon this failure of direct proof of appellant's use of the mails; but the absence of direct proof is not fatal to the Government's case, for "The use of the mails may be established, like most other facts, by circumstantial evidence." *Stevens* v. *United States, supra* at 836. In *Leathers* v. *United States*, 135 F. 2d 507 (2 Cir. 1943), our earlier case of *United States* v. *Baker*, 50 F. 2d 122 (2 Cir. 1931), was distinguished on the ground that in *Baker* testimony had been received indicating that the letters there involved might have been delivered by hand and, because no direct proof of mailing was offered, this made indirect proof insufficient because "the circumstances proved [did not] exclude all reasonable

doubt" that the mails were in fact used. 50 F. 2d at 123. However, here, as in *Leathers*, there is no reasonable doubt. The testimony of AIC's secretary that she typed the letters in New York, Dean's receipt of them in Philadelphia, the scheme for applying for loans all over the country, all lead to the credible inference that the letters involved here went through the mails.[8] Viewing the evidence as a whole, submission of the case to the jury was proper and the jury could reasonably have concluded that the letters were mailed from New York.[8]

Contrary to appellant's assertion, Dean's recollection of a telephone call he had in June or July, 1968, with "Leonard Case" did not violate appellant's Sixth Amendment right to confront the witnesses against him. The purpose of this testimony was to prove that the "Leonard Case" who spoke over the telephone to Dean was really the appellant. Dean was unable to identify the voice as that of Fassoulis, but "the requirement of direct recognition of the voice is not, however, an inexorable or mechanical rule. Circumstantial evidence may be sufficient to identify the speaker." *United States* v. *LoBue*, 180 F. Supp. 955, 956 (S. D. N. Y. 1960), *affirmed*, 310 F. 2d 817 (2 Cir. 1962). Here the circumstantial evidence was, indeed, sufficient. Rafsky testified that he was present in New York when Fassoulis spoke on the telephone with someone at the Philadelphia Bank and that after the conversation had been concluded Fassoulis told him that any letters from Dean addressed to "Leonard Case" were to be delivered to Fassoulis. The letters which

[8] The evidence was sufficient to indicate that the letters were mailed in the Southern District of New York. That is all the venue statute, 18 U.S.C. §3237(a), requires. *United States* v. *Cashin*, 281 F. 2d 669 (2 Cir. 1960).

Appendix A

Dean received signed by "Leonard Case" were typed at Fassoulis's direction. Furthermore, Sanders, AIC's Treasurer, testified that he heard Fassoulis represent himself as "Case" over the telephone. The aggregate of circumstances thus developed make it "extremely remote or highly improbable that anyone other than the defendant was the declarant." *Id.* at 956; see *Van Riper* v. *United States*, 13 F. 2d 961 (2 Cir. 1926); *Jarvis* v. *United States*, 90 F. 2d 243 (1 Cir.), *cert. denied*, 302 U. S. 705 (1937). We have no difficulty in holding that here there was no constitutional deprivation.

Appellant claims that the court's remarks contained in the charge to the jury concerning Fassoulis's failure to testify were violative of appellant's Fifth Amendment right to exercise his privilege against self-incrimination by not testifying in his own behalf. These remarks are set forth in the margin.[9] We find nothing unfair or inaccurate in them. Cf. *United States* v. *Garguilo*, 310 F. 2d 249, 252 (2 Cir. 1962).[10]

---

[9] The charge was as follows:

> I also point out to you, and, again, you are aware of this from your own observations, that the defendant Fassoulis did not take the stand and testify on his own behalf as a witness in this case. Under our system he had no obligation to get on the stand and offer any evidence at all. Indeed, he doesn't have to offer any other evidence through witnesses. He can simply remain silent, and that is his right and privilege under our system.
>
> Therefore, I instruct you that you are not to hold against him, or, indeed, for him, the fact that he availed himself of his right not to testify here as a witness. Indeed, I ask you not even to consider it at all one way or another in your deliberations.

[10] Appellant also raises three additional arguments in order to preserve them for "further appeal, if necessary." We agree that the claims of error so "preserved" are controlled by decisions adverse to appellant.

Appendix A

The Conspiracy Count

The conspiracy count alleged ten overt acts, two of which, Acts Seven and Nine, set forth that Rafsky had mailed letters to the Cleveland Trust Company and the Long Island Trust Company in furtherance of the scheme to defraud. These acts were later alleged in the indictment as substantive Counts Four, Six, Ten and Fifteen. In charging the jury on the law, Judge Tyler emphasized that proof of any one of the overt acts would be sufficient to support a guilty verdict on the conspiracy count. The jury returned guilty verdicts on the conspiracy count and on each of the four related substantive counts. However, after the verdicts had been returned Judge Tyler then set aside the verdicts returned on the four substantive counts for failure of proof of use of the mails. In view of this act by the trial judge appellant maintains that, inasmuch as the jury might have found appellant guilty of conspiracy upon the facts alleged in the substantive counts found not to have been proven, he was placed in jeopardy twice, thus violating the Fifth Amendment,[11] and that his conviction upon Count One, the conspiracy count, was unconstitutionally obtained.

We note initially that, as a general rule, an acquittal on a substantive charge does not prevent a conviction for a conspiracy to commit the offense substantively charged unless the necessary proof on the substantive charge is identical with that required to convict on the conspiracy

---

[11] The Fifth Amendment guarantee against double jeopardy was made applicable to the States in *Benton* v. *Maryland*, 395 U. S. 784 (1969). That case makes it clear that collateral estoppel, and res judicata, have constitutional standing in criminal cases. See *Sealfon* v. *United States*, 332 U. S. 575 (1948).

count. *Pereira* v. *United States*, 347 U. S. 1 (1954). The Fifth Circuit has noted an exception to this general rule and it is this exception which appellant argues is determinative here. In *Yawn* v. *United States*, 244 F. 2d 235 (5 Cir. 1957), the appellant, who had been acquitted by a jury of possession of an illegal still, was subsequently convicted of conspiracy to violate the liquor laws, one of the overt acts in furtherance of the conspiracy being the possession of this same still. The conspiracy conviction was reversed for a new trial in which evidence concerning the possession of the still would be excluded, the court holding that the doctrine of collateral estoppel precluded the Government from introducing that evidence at the later trial. The court specifically distinguished its collateral estoppel holding from the doctrine of double jeopardy. Although *Ashe* v. *Swenson*, 397 U. S. 436 (1970), holds that collateral estoppel also has constitutional dimensions in criminal cases, the effects of the two principles remain different. In any event, *Yawn* is not applicable to the present case inasmuch as collateral estoppel could not have arisen until after the verdict.

In a later case in our own circuit, *United States* v. *Bletterman*, 279 F. 2d 320 (2 Cir. 1960), appellant was convicted of conspiracy. Although the indictment alleged six overt acts, it was conceded on appeal that no evidence whatever had been introduced at trial to connect appellant with one of them. We said that the erroneous submission to the jury of this unproven overt act was harmless because proof of the remaining acts "not only was clearly established, but indeed was undisputed." *Id.* at 322. See also *United States* v. *Bottone*, 365 F. 2d 389, 394-395 (2 Cir. 1966), *cert. denied*, 385 U. S. 974 (1966). Thus, even if *Yawn* were apposite, we would still need to

decide whether the alleged error was harmless. See *Chapman* v. *California*, 386 U. S. 18 (1967); Traynor, *The Riddle of Harmless Error* (1970).

Here there is no need to speculate either as to whether the verdict was influenced by the unproven overt acts or to weigh the likelihood of such influence. Even if the jury considered the unproven acts in arriving at its verdict, the conspiracy conviction can be independently upheld in view of the guilty verdicts returned by the same jury on substantive Counts Five, Eight, Twelve and Sixteen. A conspiracy conviction may be sustained upon a showing of overt acts in furtherance of the conspiracy even if the overt acts are not alleged in the indictment. *United States* v. *Armone*, 363 F. 2d 385, 400 (2 Cir.), *cert. denied*, 385 U. S. 956 (1966); *United States* v. *Negro*, 164 F. 2d 168 (2 Cir. 1947). By validly returning guilty verdicts on the four substantive counts, counts which clearly set forth acts done in furtherance of the conspiracy alleged in Count One, the jury demonstrated its belief that appellant, found guilty of mail fraud, also conspired as to defraud by using the mails. Thus, the erroneous submission of the unproven overt acts was harmless beyond a reasonable doubt.[12]

Affirmed.

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[12] Appellant also objects on due process grounds that overt act six in the indictment, eliminated at the prosecution's request, was not completely obliterated in the jury copy and hence the jury had before it a charge which had been dropped from the case. This claim is without merit.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of June, one thousand nine hundred and seventy-one.

Present:

HON. HENRY J. FRIENDLY,
Chief Judge,

HON. STERRY R. WATERMAN,
Circuit Judge,

HON. EDWARD C. McLEAN,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SATIRIS G. FASSOULIS, *et al.*,
Defendants,

SATIRIS G. FASSOULIS,
Defendant-Appellant.

Appendix B

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

/s/ W. B.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 35479

UNITED STATES OF AMERICA,

Appellee,

against

SATIRIS G. FASSOULIS,

Appellant.

PETITION FOR REHEARING BY THE COURT AS CONSTITUTED IN THE ORIGINAL HEARING OR EN BANC, OR IN THE ALTERNATIVE FOR A STAY OF THE MANDATE AND CONTINUANCE OF BAIL PENDING APPLICATION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Second Circuit, Friendly, Chief Judge, Waterman, Circuit Judge and McLean, District Judge:

The decision affirming the conviction below was rendered, and judgment entered thereon, on June 18, 1971.

Appellant respectfully petitions this Honorable Court for a rehearing of the appeal by the Court as constituted

in the original hearing or en banc, to submit once again the argued position on the points of the appeal, and particularly call the Court's attention to the following:

(i)

On Proof of Mailing

In its decision this Court, reduced to the necessity of invoking what it terms circumstantial evidence, has studiously ignored the most important fact of all, the fact that establishes *non*-mailing. The Court says:

> "No direct evidence was introduced at trial that they were mailed in New York but the Government's Exhibit, the Count Eight letter, was marked 'Special Delivery', and the envelope front attached to the letter had a private postage meter mark showing New York as the place of mailing." (slip opinion p. 3592)

The Count Eight envelope (now stapled to Gov. Exh. 198), was the only envelope produced in the entire case. The private postage meter mark was put on it in the AIC office but it is not a U. S. postal marking. It does not show "New York as the place of mailing." It does not show "mailing" at all. It is a meter charge in lieu of regular stamps, a method of giving postal credit, nothing more.*

---

* The meter tape reads "New York, N. Y. June 18, '68, U. S. Postage 48 T-N Meter Company." As we said at page 14 of our main brief, it is a commonly known fact that these postage tapes bear marks identifying the company which manufactures the particular machines, in this case Postalia Corp., 32-31 Woodside Queens, N. Y., which uses the mark T-N. See Postalia Corp., in the New York Telephone Manhattan Yellow Pages, 1970, page 1204.

Appendix C

The envelope itself is not a whole envelope; the back half has been completely removed, partly cut and partly torn off. The inference from its mutilated state is compelling. Had this presumably "Special Delivery" envelope been posted in the U. S. mails, the reverse side would have shown definitely the fact of U. S. mailing. See:

> "Postal Procedures TL-226 333.344b*
>
> "333.344b. Acceptance, Distribution & Dispatch:
>
> Distribution
>
> c. Special Delivery Letters. Backstamp once at the point where incoming pouches are first opened. If special delivery service is decentralized, backstamp both at original pouch opening point and delivery unit. The backstamps must show unit name, date and hour or half hour of receipt."

But the reverse side, the back half of the envelope is missing,—removed, we submit, because there are no U. S. post office backstamps on it and their absence establishes beyond peradventure of a doubt the "non-mailing."**

The Court has blinked its eyes at this more-than-circumstantial proof of non-mailing, and in its place adopted a standard of proof never before invoked in a mail fraud case. That standard is thus stated:

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* On judicial notice of postal regulations, see *Coha* v. *United States*, (1894), 152 U. S. 211, 221; *Hughes* v. *Genler*, (C. A. 9, 1969), 404 F. 2d 229, 231.

** Mr. Shaw, the prosecutor, explained on the argument in this Court, *dehors* the record, that Dean delivered the envelope to him already mutilated, and told him that he, Dean, had removed the back *to save space!!*

Appendix C

> "The testimony of AIC's secretary that she typed the letters in New York, Dean's receipt of them in Philadelphia, the scheme for applying for loans all over the country, all lead in the credible inference that the letters involved here went through the mails." (Slip Opinion, p. 3593)

But the AIC secretary did not mail Gov. Exh. 198, or the other three letters, Gov. Exhs. 197, 199, and 200; she did not even see them signed by anyone. She was not even asked, and presumably knew nothing, about the method of their delivery, or the method of delivery of any other letter in the record. There were and are available many methods of delivery besides mailing.*

Even beyond these four Count letters, there is no credible evidence in the entire record either from the AIC secretary or anyone else, that the mails were used in any single instance. The fact that the Trial Court was compelled, reluctantly, to dismiss the other eight substantive counts after a guilty verdict, is eloquent enough on the absence of proof of mailing.

The conviction rests upon an evident insufficiency of proof; it is bolstered only by a declaration of assumed but non-existent circumstantial evidence. Thus, the Court has deprived appellant of his right to due process on a record that mocks the constitutional requirement.

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* E. G. air express by companies such as Air Express, Division of REA Express, 219 East 42nd Street, New York City, and 61 South Clinton Street, Chicago, or bus delivery by companies such as Continental Trailways, Package Express Department, 8th Ave., and 41st Street, New York City and 1200 Eye St., Wash. D.C. 20005, and of course, personal hand delivery.

Appendix C

In re Winship (1970), 397 U. S. 358, 366:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

(ii)

On Proof of Venue

What is thus far clear on the lack of proof of mailing, *supra*, applies *a fortiori*, indeed, with vengeance, to the lack of proof of venue. On venue there is not one jot or tittle of proof. The cavalier disposal of this point by a footnote (Slip, Opinion, p. 3543) is appalling.

Since there was nothing else at hand, the Court had to invoke so-called circumstantial evidence, namely, that the scheme involved "applying for loans all over the country" to justify its assertion that the mails "were in fact used" in the four substantive counts here involved. But how could proof of other mailings, elsewhere in the country, if established at all (as they never were), help to establish that these four letters were "mailed in the Southern District of New York"? (Slip Opinion, p. 3593, footnote 8).

The Court's present holding belies its own prior decisions that venue in a criminal case is not a formality but a "deep issue of public policy". See e.g. *U. S.* v. *Provoo* (2 C. A. 1954), 215 F. 2d 531.

Appendix C

(iii)

On the Conspiracy Count

The Court has attempted to distinguish *Yaun* v. *U. S.* (5 C. A., 1957), 244 F. 2d 235, by a distinction that involves no difference. Acknowledging the double jeopardy constitutional dimensions of collateral estoppel (*Ashe* v. *Swenson* (1970), 397 U. S. 436), the Court nonetheless says:

> "In any event *Yaun* is not applicable to the present case inasmuch as collateral estoppel could not have arisen until after the verdict." (Slip Opinion, p. 3597)

But the late timing of the estoppel was not appellant's fault. Had the Trial Court dismissed the four substantive mailing counts, involved in overt acts seven and nine, when he should have,* that is, at the close of the government's case, the collateral estoppel would then have come *before* the verdict, and the principle of *Yaun* would apply. Is appellant to suffer the loss of his Constitutional right because the Trial Court made an error which it subsequently had to correct?

Furthermore, the Court, to sustain the conspiracy verdict, ought not to have relied, as it has done and had to do (Slip Opinion, pp. 3597-8), on the overt acts evidenced in the four substantive counts that remain undismissed. For we have shown, in item (i) above, that they too should have been dismissed. Were that done, as it should

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* Since these counts were later dismissed for failure of proof, i.e., lack of a prima facie case, it is clear that they should never have been given to the jury in the first place.

be, even the conspiracy count fails. *Parr* v. *U. S.* (1960), 363 U. S. 370, 383.

For extended argument on the three points set out above, we respectfully refer the Court to our main and reply briefs. In any event, we submit that sufficient appears here to warrant certiorari in the Supreme Court on the constitutional issues of due process and double jeopardy, and on venue, a deep issue of public policy; and also on the Sixth Amendment right of confrontation (our main brief Point Three, pp. 19-20) which our limit to 10 pages does not permit us to enlarge upon.

There are further important issues (Points Five to Eight of our main brief), precluded by decisions in this Court but which we intend to raise on petition for certiorari.

(iv)

Conclusion on the Legal Points

We briefed and argued this appeal solely on legal and constitutional issues. No resolution of disputed facts was involved. This Court's decision appears to go out of its way to stress facts which tend to accentuate appellant's guilt.* We are moved to quote the very recent Supreme Court opinion in *Coolidge* v. *New Hampshire*, 39 L. W. 4795 (6/21/71):

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* The footnote on p. 3591 of the Slip opinion is a classic instance. But we are nowhere told the fact that the witness there referred to was a named co-conspirator (3rd bill of particulars) who, it seems obvious, was omitted as a defendant in exchange for his testimony, and who had to admit on cross-examination that he had perjured himself repeatedly before the Grand Jury.

Appendix C

> "We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law."

Whether the Court considers this case a particularly callous fraud is wholly beside the point. Whether one thinks appellant is guilty is equally beside the point. Before the law no man is guilty until he has been so found within the law and the Constitution. The charge here is *mail* fraud, not common law fraud, nor false pretenses, not larceny nor the like. The Court, we submit has now thrown to the winds all the existing case law on proof of mailing,* and on proof of venue. Both mailing and venue, as essential elements of a criminal charge, require proof beyond a reasonable doubt. Not only is there no such proof; there is not even proof by a preponderance of the

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* Even *Stevens v. U. S.* (5 C. A. 1962), 306 F. 2d 834, 835 cited by this Court as authority for its present holding, required at least:

> "The showing of the customs, usages, and practices in the course of business with evidence of the letter in the customary channel of mail matter . . ."

and in its only other authority, *U. S. v. Leathers*, (C. A. 2, 1943), 135 F. 2d 507 the proof included:

> ". . . officials of both the sending and receiving banks testified that the cash letters and checks covered in Count 1, were sent by mail. Also, these witnesses testified to the custom, the ordinary course of business of both those banks . . ."

credible evidence. There is, in truth, no proof at all. The decision has flouted the "due process" requirement of the Fifth Amendment. *In re Winship* (1970), 397 U. S. 358, 366.

There is in this case that "stealthy encroachment" on and "gradual depreciation" of the constitutional right of due process condemned in *Boyd* v. *U. S.* (1886), 116 U. S. 626, at 635; *Gouled* v. *U. S.* (1921), 225 U. S. 298, at 303-304; and *Go-Bait Importing Co.* v. *U. S.* (1931), 282 U. S. 344, at 357.

As to Staying the Mandate and Continuing Bail Pending Application for Certiorari to the Supreme Court

In the event this Court should deny rehearing, appellant intends to present to the United States Supreme Court a petition for a writ of certiorari to review the determination of this Court. It is respectfully prayed that the mandate of this Court be stayed until the determination of said petition so to be filed, and that pending such determination the appellant be continued on bail.

Appellant was sentenced to five concurrent four and a half year terms, and is at liberty on bail of $10,000 in the form of a Surety Company bond. He has always been available whenever his presence was required. He has resided for the last four years and presently resides at 333 East 69th Street, New York City, and he has been regularly employed for the last year, and is now employed at 60 East 56th Street, New York City by a popcorn vending company. He has retained the undersigned to apply promptly for certiorari to the Supreme Court and proceed there if the petition is granted.

Appendix C

In view of the foregoing facts we respectfully submit that the mandate be stayed and bail be continued pending determination of the certiorari proceedings.

No prior application for the relief prayed for herein has been made.

For the reasons set forth this petition for rehearing or in the alternative, for a stay of the mandate and a continuance of bail should be granted.

Respectfully submitted,

WILLIAM T. GRIFFIN,
Attorney for Appellant.

Certificate

I, WILLIAM T. GRIFFIN, certify that I am the attorney for appellant Fassoulis; that I make this certificate in compliance with the rules of this Court; that in my judgment the within and foregoing petition is well founded and is not frivolous or interposed for delay.

WILLIAM T. GRIFFIN

Dated: July 1, 1971

APPENDIX D

35479

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SATIRIS G. FASSOULIS, *et al.*,

Defendants,

SATIRIS G. FASSOULIS,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

ORDERED that said petition for a rehearing be and it hereby is DENIED.

Appendix D

Petitioner may remain on bail pending disposition of that request by any final action of the en banc court. Motion to stay issuance of the mandate is DENIED.

HENRY J. FRIENDLY
U.S.C.J.

STERRY R. WATERMAN
U.S.C.J.

EDWARD C. McLEAN
U.S.D.J.

July 15, 1971.

APPENDIX E

35479

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SATIRIS G. FASSOULIS, *et al.*,

Defendants,

SATIRIS G. FASSOULIS,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
Chief Judge

July 15, 1971.

Appendix E

Certificate of Service

I hereby certify that on this 9th day of August, 1971, three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, as counsel for the United States, the only other party to the appeal.

Dated: August 9th, 1971

William T Griffin
Counsel for Petitioner
161 William Street
New York, New York 10038
Telephone: (212) 962-5442

APPENDIX F

TABLE OF RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamour crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

United States Code Annotated

Title 18—§371. Conspiracy to commit offense or to defraud United States.

Appendix F

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18—§1341. Frauds and Swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Appendix F

Title 19, §3237. Offenses begun in one District and Completed in Another.

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense, and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through or into which such commerce or mail matter moves.

Federal Rules of Criminal Procedure

Rule 18, Place of Prosecution and Trial

Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses.

Postal Procedures TL-226

333.344b. Acceptance, Distribution & Dispatch: Distribution

C. Special Delivery Letters. Backstamp once at the point where incoming pouchers are first opened. If special delivery service is decentralized, backstamps both at original pouch opening point and delivery unit. The backstamps must show unit name, date, and hour or half hour of receipt.

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No. 71-203

In the Supreme Court of the United States

OCTOBER TERM, 1971

SATIRIS G. FASSOULIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
ROGER A. PAULEY,
EDWARD FENIG,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1971. A petition for rehearing was denied on July 15, 1971. On August 10, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in this conspiracy and mail fraud case the evidence as to the use of the mails in New York, New York, was sufficient to establish venue in the Southern District of New York.

444-021—71

2. Whether the evidence as to use of the mails was sufficient.

3. Whether, where the indictment included among the overt acts of a conspiracy to commit mail fraud, mailings on which some of the substantive counts were based, the trial judge's post-verdict dismissal of those substantive counts required dismissal of the conspiracy count.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy and twelve substantive mail fraud offenses, in violation of 18 U.S.C. 371, 1341. The trial court set aside the guilty verdict as to eight of the twelve substantive counts for lack of proof as to the use of the mails.[1] On August 25, 1970, petitioner was sentenced to concurrent prison terms of four and one-half years. The court of appeals affirmed (Pet. App. A).

The facts are comprehensively set forth in the opinion of the court of appeals. Briefly, in April and May, 1968, petitioner and two business associates controlled two companies, AIC Corporation (AIC) and Intercoastal Investors Company, Ltd. They arranged for their companies to obtain insurance policies on their lives from Community National Life Insurance (Community National).[2] Without paying the

[1] Convictions were left standing as to the conspiracy count (Count 1) and four substantive counts (Counts 5, 8, 12, 16) (Pet. App. A 6a).

[2] Two associates, Rafsky and Reifler, together with Ryan, the president of Community National, as well as the three

single premiums required to give the policies any cash surrender values, they obtained policies with stated cash surrender values of approximately $2.6 million. It was understood by the parties—but not stated in the policies—that the surrender rights could not be utilized unless and until the premiums were paid. Using these policies with their stated cash surrender values as collateral for loans, petitioner and his associates borrowed approximately $670,000 from various banks in the United States (Pet. App. A 3a–4a).

Petitioner's company, AIC, was located in New York City and petitioner represented that one of its vice-presidents was "Leonard Case," a prominent business executive (Pet. App. A 5a).

In June 1968 petitioner made a loan application on the strength of the Community National insurance policies to First Pennsylvania Bank and Trust Company, located in Philadelphia (Pet. App. A 7a, Pet. 7). Telephone and letter inquiries made by the bank to AIC concerning the desired loan were answered by petitioner, using the name of "Leonard Case" (Pet. App. A 8a–9a.) Four letters addressed to the bank in Philadelphia, which are the subject of the four substantive counts involved here, were dictated by petitioner in New York for the signature of "Leonard Case." The envelope for one of the letters (GX 198) bore the words "Special Delivery" and had a postage meter

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companies involved, were named as co-defendants with petitioner. Only Community National and petitioner pleaded not guilty, with Community National's case being severed (Pet. App. A 2a–3a).

mark showing New York City as the place of mailing. The other three letters originated in AIC's New York office, but their envelopes were not retained by the bank. All four were received in Philadelphia by Dean, one of the bank's loan officers, who testified that they had arrived there as "mailings" (Pet. App. A 6a–7a, 9a).

ARGUMENT

1. Petitioner urges that venue in the Southern District of New York was not proved (Pet. 4–6). Venue in that district was proper if that was the district from which the letters moved. 18 U.S.C. 3237; see *Reed Enterprises* v. *Clark*, 278 F. Supp. 372, 376–377 (D. D.C.), affirmed, 390 U.S. 457; *Lord* v. *United States*, 412 F. 2d 499, 500–501 (C.A. 4). The evidence at trial and postal regulations pertaining to metered mail indicate that the mail moved from New York, New York, in the Southern District of New York. A secretary in AIC's New York office testified that she typed the letters (Pet. 4–5). The envelope for one of the letters (GX 198) bore a circular impression reading "New York, N.Y., June 18, '68" (Pet. 7, fn.). Such an impression indicates the post office of mailing (39 C.F.R. 144.3(c)(3)). Petitioner is mistaken in his suggestion (Pet. 5) that such mail can be mailed "quite conveniently in other districts close-by" such as Brooklyn, New York, or New Jersey communities. Metered mail may only be mailed from the post office shown in the meter stamp (39 C.F.R. 144.6(b)). Moreover, each of the remaining letters—as opposed to their envelopes which were not retained—showed AIC's New York office as the mailer's

address. Accordingly, the jury could properly conclude that the letters here involved were mailed in the Southern District of New York. See *Dunlop* v. *United States*, 165 U.S. 486, 494–495; *Headley* v. *United States*, 294 Fed. 888, 890 (C.A. 5).[3]

2. Petitioner contends that the proof was insufficient to show that the mails were utilized at all in furtherance of the scheme (Pet. 5, 7–9). The references to "Special Delivery" and the metered mail marking, however, are strongly indicative of a mailing in New York and thus corroborative of Dean's testimony that all four letters were received in Philadelphia as "mailings." It is unreasonable to suggest, as petitioner does, that after paying for metered postage (39 CFR 144.3(b)), AIC may have shipped a letter by any one of several presently suggested "other methods" (see Pet. 5, fn.). The evidence presented by the government thus permitted the jury to find that the mails were utilized. No direct evidence by an employee of AIC that she recalled mailing the letters was required. See *Smith* v. *United States*, 343 F. 2d 539, 543–544 (C.A. 5), certiorari denied, 382 U.S. 861; *United States* v. *Leathers*, 135 F. 2d 507, 510 (C.A. 2).

[3] Neither *Travis* v. *United States*, 364 U.S. 631, nor *Serio* v. *United States*, 377 F. 2d 936, 939 (C.A. D.C.), upon which petitioner relies (Pet. 6), involved mail fraud offenses and both are distinguishable on their facts. In *Travis*, the crime charged had a defined locus, one different from where prosecution was instituted. In *Serio*, venue was alleged to be in one district but evidence was introduced which tended to show that the crime of altering money orders had been committed in another district.

3. The jury convicted petitioner on all counts submitted to it. After verdict, the court set aside the verdicts as to four substantive counts (Counts 4, 6, 10, 15) in which mailings were charged which had also been the basis for two of the ten overt acts alleged under the conspiracy count (Pet. App. A 10a). Petitioner contends that his conspiracy conviction must also be set aside under the doctrine of collateral estoppel (Pet. 9–12).

Whether or not the trial court's ruling as to the dismissed substantive counts was dispositive as to two of the ten overt acts, the validity of the conspiracy conviction is unaffected. The government's proof as to other of the overt acts was ample and uncontradicted. Proof of those overt acts was sufficient to sustain the conspiracy conviction, *United States* v. *Bletterman*, 279 F. 2d 320 (C.A. 2).[4] Moreover, as the court below observed (Pet. App. 12a), the jury returned guilty verdicts on Counts 5, 8, 12 and 16, which were sustained by the trial judge. The convictions involved overt acts clearly done in furtherance of the conspiracy alleged in Count 1. Such overt acts are sufficient to sustain a conspiracy conviction even if they are not alleged as such in the indictment. *United States* v. *Armone*, 363 F. 2d 385, 400 (C.A. 2), certiorari denied, 385 U.S. 957; *United States* v. *Negro*, 164 F. 2d 168 (C.A. 2); *Reese* v. *United States*, 353 F. 2d 732, 734 (C.A. 5); *Brulay* v.

[4] See, *e.g.*, Appellant's Appendix in the Court of Appeals for the Second Circuit 445a–446a; 464a; 391a–402a; GX 122–A; GX 174.

United States, 383 F. 2d 345, 350–351 (C.A. 9), certiorari denied, 389 U.S. 986. Thus, as the court of appeals found, any error in submission of unproven overt acts to the jury was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18.

In addition, even if there be deemed a failure of proof on the conspiracy count, the sentence imposed is fully supportable under the substantive counts and application of the concurrent sentence doctrine as a rule of "judicial convenience" would be appropriate. *Benton* v. *Maryland*, 395 U.S. 784, 792; *United States* v. *Barsaloux*, 419 F. 2d 1299 (C.A. 5), certiorari denied, 397 U.S. 972.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-203

SATIRIS G. FASSOULIS,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

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DATED: New York, New York
September 15th, 1971

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REPLY BRIEF ON BEHALF OF PETITIONER

On Mailing

The Government brief infers from the private postage meter marking on the only envelope produced (GX 198), that since AIC paid the postage, it is unreasonable for us to suggest AIC's use of any other method of transmittal. Thus, according to the Government's argument, does it satisfy the need of proving mail use beyond a reasonable doubt. The Government fails to say how much the postage was. The marking shows it was 48 cents.

While relying on the private metering marking on the envelope (GX 198) for its proof of mail use, the Government carefully avoids any mention whatsoever of the missing back half of the envelope. Had mailing of the envelope actually occurred, this back half would have had to be stamped in the receiving and in the delivering post office (Postal Procedures TL-226, 333.344b). The Government's use of a mutilated exhibit from which the significant half had been removed, serves to emphasize the failure of proof.

The Government fails to mention, much less defend, the "credible inference" standard of proof of mailing proffered by the Second Circuit Court to sustain the conviction.

On Venue

The Government now asserts adequate proof of venue by invoking a postal regulation. The regulation (39 C.F.R. 144.6(b)) provides for mailing only from the post office shown in the private meter stamp. The meter stamp does not support the Government's claim of proper venue in the Southern District of New York. The post office shown on this meter marking is "New York, N.Y.". This refers to New York City. New York City includes Brooklyn and Queens, both of which are in the Eastern District of New York. Thus, even under the regulation, assuming that the sender complied with it strictly, the envelope, GX 198, (if mailed at all) could quite conveniently have been mailed in the Eastern District of New York rather than the Southern District. It was the Government's burden to show venue, not the defendant's to disprove it.

On The Conspiracy

The overt acts of mailing, set out in the four substantive counts, cannot sustain the conspiracy conviction, as the Government contends, because the judgment on those counts should be reversed for failure of proof of mailing, and failure of proof of venue, as shown above. For the same reason, the concurrent sentence doctrine, invoked by the Government, is inapplicable.

The Government cites *U.S.* v. *Bletterman* (2 C.A.), 279 F. 2d 320, as negating our argument on double jeopardy. In *Bletterman,* submission of an overt act (one among a total of six) was held harmless error even though no proof of that act was adduced. But here, the two overt acts submitted among a total of ten, were two on which defendant *was found not guilty.* Thus, *Yawn* v. *U.S.* (C.A. 5, 1957), 244 F. 2d 235, and *Ashe* v. *Swenson* (1970), 397 U.S. 436, apply and require reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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